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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 294

MARY L. MEGGE, ANDREW MEGGE, JUDY ANN MEGGE, by her Guardian Andrew Megge, BARBARA LAYMAN, JANET ANN ZIOLKOWSKI, by her Guardian Dorothy Ziolkowski, and ANDREW MEGGE, Administrator of the Estate of Nancy Megge, Deceased, and ARTHUR ZIOLKOWSKI,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Mary L. Megge, Andrew Megge, Judy Ann Megge, by her Guardian Andrew Megge, Barbara Layman, Janet Ann Ziolkowski, by her Guardian Dorothy Ziolkowski, and Andrew Megge, Administrator of the Estate of Nancy Megge, Deceased, and Arthur Ziolkowski, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit en-

tered in the above entitled case on April 14, 1965, affirming an order of dismissal by the United States District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The order or dismissal entered on December 11, 1963 by the United States District Court for the Eastern District of Michigan, Southern Division, appears in Appendix A hereto, *infra*, page 15.

The opinion on motion to dismiss, filed December 6, 1963 by the United States District Court for the Eastern District of Michigan, Southern Division, appears in Appendix B hereto, *infra*, pages 16, 17.

The judgment and opinion of the United States Court of Appeals, Sixth Circuit, entered April 14, 1965 affirming the order of dismissal of the United States District Court, a copy of which judgment and opinion is appended hereto as Appendix C hereto, *infra*, pages 18-22. The citation of this Opinion is *Megge v. United States*, 344 F. 2d 31.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit was entered on April 14, 1965 (Appendix C, *infra*, pages 18-22).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) (Appendix D, *infra*, page 23).

QUESTION PRESENTED

I. *Whether an action lies against the United States of America under the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b) and 2671-2680, (Appendix D, infra, pages 23-25), when an employee of the United States of America on a military reservation serves intoxicating liquor to a person after he is intoxicated, who thereafter drives upon a public highway, and because of said intoxicated state, collides with a motor vehicle injuring the petitioners in a state, the law of which provides, that a sale of intoxicating liquors to a person who is already intoxicated is unlawful and allows persons injured to institute action for damages against said seller.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are 28 U.S.C. §1346(b) (Appendix D, *infra,* page 23); 28 U.S.C. §2671 (Appendix D, *infra,* page 23); 28 U.S.C. §2674 (Appendix D, *infra,* page 24); 28 U.S.C. §2680 (Appendix D, *infra,* page 25).

Michigan Compiled Laws, 1948, §436.1, Michigan Statutes Annotated §18.971 (Appendix D, *infra,* page 26); Michigan Compiled Laws; 1948, §436.2, Michigan Statutes Annotated §18.972 (Appendix D, *infra,* page 27); Michigan Compiled Laws, 1948, §436.2(m), Michigan Statutes Annotated §18.972(13) (Appendix D, *infra,* page 28); Michigan Compiled Laws, 1948, §436.22; Michigan Statutes Annotated §18.993 (Appendix D, *infra,* pages 29-32); Michigan Compiled Laws, 1948, §436.26(c), Michigan Statutes

Annotated, §18.997(3) (Appendix D, *infra*, page 32); Michigan Compiled Laws, 1948, §436.29, Michigan Statutes Annotated §18.1000 (Appendix D, *infra*, page 33); Michigan Compiled Laws, 1948, §436.44, Michigan Statutes Annotated §18.1015 (Appendix D, *infra*, page 33); Michigan Compiled Laws, 1948, §436.54, Michigan Statutes Annotated §18.1025 (Appendix D, *infra*, page 33).

STATEMENT OF THE CASE

(References such as R. 2a refer to pages of Transcript)

This is an action against the United States for damages for the death of Nancy Megge, Deceased and personal injuries sustained by the other petitioners on July 6, 1961.

Petitioners filed their complaint June 25, 1963 and an amended complaint on October 7, 1963, alleging in addition to jurisdiction, other preliminary matters; and the resulting injuries and death:

(1) That the United States maintained and operated, at Selfridge Air Force Base in Michigan, a noncommissioned officers' club where employees of the United States on July 6, 1961 negligently and wrongfully sold beer and other intoxicating liquors to a Sgt. Russell Evans after he became intoxicated (R. 3a, 19a).

(2) That as a result of said sales, Sgt. Evans became further intoxicated impairing his ability to react, perceive and to make normal use of his arms and legs (R. 4a, 20a).

(3) That thereafter, while so intoxicated, Sgt. Evans drove his automobile on Jefferson Avenue and because of said intoxication did cross the center line of the highway striking petitioners' vehicle head-on causing severe injuries to petitioners (R. 3a, 4a, 19a, 20a).

Respondent filed a motion to dismiss petitioners' complaint, disputing none of petitioners' allegations but alleging:

(1) That the Michigan Civil Damage Act (Mich. Comp. Laws, '48, §436.22, Mich. Stat. Ann. §18.993, Appendix D, *infra,* pp. 29-32), can have no application to sales of intoxicating liquors on an air force base over which the United States has exclusive legislative jurisdiction (R. 14a).

(2) That the Michigan Civil Damage Act (Mich. Comp. Laws, '48, §436.22, Mich. Stat. Ann. §18.993, Appendix D, *infra,* pp. 29 *et-seq.*), applies only to vendors licensed under Michigan law and was not intended to apply to a noncommissioned officers' club on air force property.

(3) That petitioners had not alleged any negligence or omission of an employee of the United States of America.

This motion to dismiss was granted in an opinion filed December 6, 1963 (Appendix A, p. 15). An order granting said motion to dismiss was entered by the United States District Court on December 11, 1963 (Appendix B, pp. 16-17).

An appeal was taken to the United States Court of Appeals for the Sixth Circuit and resulted in an opinion and judgment of affirming the order of dismissal Appendix C, pp. 18-22).

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THIS ACTION PRESENTS A CASE OF FIRST IMPRESSION INVOLVING A CONTRUCTION OF THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §1346(b) and §§2670-2681 (Appendix D, infra, pp. 23-33) WHETHER OR NOT THE UNITED STATES OF AMERICA IS IMMUNE, UNDER THIS ACT, FROM LIABILITY FOR DAMAGE UNDER STATE CIVIL DAMAGE ACTS, WHICH QUESTION HAS BEEN DECIDED BELOW IN CONFLICT WITH PRINCIPLES LAID DOWN BY CONGRESS, THIS COURT AND OTHER COURTS OF APPEALS.

Here an employee of the United States of America, acting in the course of his employment, sold large quantities of intoxicating liquors to an intoxicated person, thereby causing that person to become further intoxicated, impairing his ability to react and perceive and to make normal use of his arms and legs, which resulted in injuries and death to citizens. This occurred within the boundaries of Michigan, a state where such a sale by a private citizen would be wrongful and result in liability for damages.

Petitioners submit that the Court of Appeals for the Sixth Circuit, in affirming the order of dismissal has: (1) decided an important question of federal law which has not been settled by this Court; and (2) has decided that question in a way that conflicts with principles expressed in decisions of other courts of appeals, this Court and the interdiction of the Federal Tort Claims Act, 28 U.S.C. §1346(b) (Appendix D, *infra*, p. 23) and 28 U.S.C. §2674 (Appendix D, *infra*, p. 24) that:

> "The United States shall be liable • • • in the same manner and to the same extent as a private in-

> dividual under like circumstances * * *." (28 U.S.C. §2674, Appendix D, *infra*, p. 24.)

and:

> "* * * under circumstances where the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U.S.C. §1346(b), Appendix D, *infra*, p. 23.)

Michigan law, as it applies to private citizens, prohibits all sales of intoxicants by persons who are not licensed to sell intoxicating liquors. (Mich. Comp. Laws, 1948, §§436.1, 436.26(c), Mich. Stat. Ann. §§18.971, 18.997(3) (Appendix D, pp. 26, 32).)

Therefore, as to private citizens within the State of Michigan, sales of intoxicating liquors may not lawfully be made without being licensed to do so.

When a private citizen operating a lawful business licensed to sell intoxicating liquors makes a sale to a person who is intoxicated, such a sale is wrongful and unlawful. (Mich. Comp. Laws, 1948 §436.1, Mich. Stat. Ann. §18.993. (Appendix D, *infra*, pp. 26, 29); *Wyatt v. Chosay*, 330 Mich. 661, 3 N.W. 2d 290.)

The elements of a cause of action against a private citizen in the State of Michigan are:

(1) A sale to an intoxicated person after he becomes intoxicated;

(2) injuries to a third person by the intoxicated person;

(3) that the sale of intoxicants to the intoxicated person caused or contributed to causing the injury. (*Wyatt v. Chosay*, 330 Mich. 661, 3 N.W. 2d 290.)

With regard to element (1), the Michigan Civil Damage Act provides:

> "Every * * * person who shall be injured * * * by an intoxicated person by reason of the unlawful selling * * * to any such persons any intoxicating liquor, shall have a right of action * * * against the person who shall by such selling or giving of any such liquor have caused or contributed to any such injury * * *." (Mich. Comp. Laws, 1948, §436.1, Mich. Stat. Ann. §18.993, (Appendix D, *infra*, pp. 26-27).)

Mich. Comp. Laws, 1948, §§436.1, 436.26(c), Mich. Stat. Ann. §§18.971, 18.997(3), (Appendix D, *infra*, pp. 26, 32), make all sales by unlicensed vendors unlawful. Those sections, however, do not make an unlicensed person liable for damages. Liability for damages arises only when there is a sale to an intoxicated person.

Mich. Comp. Laws, 1948, §436.29, Mich. Stat. Ann. §18.1000 (Appendix D, *infra*, p. 33) provides that:

> "* * * No vendor shall sell any alcoholic liquor to any person in an intoxicated condition."

Mich. Comp. Laws, 1948, §436.2(m), Mich. Stat. Ann. §18.972(13) (Appendix D, *infra*, p. 28) defines "*vendor*" as follows:

> "Vendor shall mean a person licensed by the commissioner under the act to sell alcoholic liquor."

The above quoted statutes set forth the law of Michigan to be that:

(1) an unlicensed private citizen is prohibited from selling intoxicating liquors; only a private citizen who is licensed may make such sales;

(2) a sale by the only private citizens in Michigan who may legally make such sales, namely licensed vendors, and their employees or agents, to a person who is intoxicated is unlawful and subjects the vendor, his agents and employees making such a sale to a civil action for damages.

See Mich. Comp. Laws, 1948, §436.44, Mich. Stat. Ann. §18.1015 (Appendix D, *infra*, p. 32), which provides:

> "Any person engaged in the business of selling or keeping for sale alcoholic liquor in violation of this act, whether as carrier, clerk, agent, servant or employee shall be equally liable as principal both civilly and criminally for the violation of the provisions of this act * * *."

This section establishes that not only is the owner civilly liable but his employee is also.

Therefore, under Michigan law private citizens who may sell intoxicating liquor legally and their employees are liable for civil damages if they sell intoxicating liquors to an intoxicated person.

Private citizens who are not licensed are criminally liable for any sale they make but are not civilly liable unless that sale is to an intoxicated person because Civil Damage Act provision allows an action for damages only when there is an unlawful sale to an intoxicated person. That Civil Damage Act does not limit the persons liable for damages resulting from an unlawful sale to an intoxicated person to "vendors". It permits action against the "person".

The United States of America, The District Court and the Sixth Circuit Court of Appeals placed the entire emphasis of this case upon the language of Mich. Comp. Laws, 1948, §436.29, Mich. Stat. Ann. §18.1000 (Appendix D, *infra*, p. 33):

> "* * * No *vendor* shall sell any alcoholic liquor to any person in an intoxicated condition."

and the provision of Mich. Comp. Laws, 1948, §436.2(m), Mich. Stat. Ann. §18.972(13) (Appendix D, *infra*, p. 28) that:

> "Vendor shall mean a person licensed by the Commissioner under the act to sell alcoholic liquor."

In so doing, we submit that the Courts below have lost sight of the fact that the United States of America shall be liable on tort claims in the same manner and to the same extent as private individuals under like circumstances. 28 U.S.C. §1346(b); 28 U.S. C. §2674 (Appendix D, *infra*, pp. 23, 24); *Indian Towing Company v. United States*, 350 U.S. 61, at p. 69, 100 L. ed. 48, 76 S. Ct. 122, at p. 126.

This error resulted from placing the cart before the horse. Instead of determining whether or not a private citizen who made the alleged sale, with the resulting injuries, in Michigan would be liable to petitioners, the Courts below bent their efforts to determine whether or not the Michigan Legislature intended to apply the Civil Damage Act to the United States of America.

The Courts below then seized upon the fact that the United States of America did not have a license to sell alcoholic beverages under the Michigan Act and could not be required to have such a license to find that it was not a "vendor" as defined by Michigan Law. From there, the Court went on to conclude that only sales by a "vendor" to an intoxicated person were "unlawful". They held that since the United States of America was not a "vendor", no sales by it could be unlawful and, therefore, there could be no liability for damages.

We submit that even if the Michigan act applied only to unlawful sales to intoxicated persons by "vendors" that the United States should be liable because any private citizen operating a legal establishment as the United States of America was in this case would be liable as a "vendor" to the petitioners under the allegations of the complaint and amended complaint.

The Courts below have allowed their decision in this Federal Tort Claims Act to turn on the irrelevant question of whether or not the United States of America held a license to sell intoxicants.

In doing so the Courts below have ignored the fact that any private citizen operating a lawful establishment for the sale of intoxicants (ie: licensed establishment which can be required of them by the state of Michigan but which cannot be required of the United States) would be liable where he or his employee made a wrongful sale as alleged here. The Courts below ignored the fact that the Civil Damage Act itself does not limit the class of persons civilly liable to "vendors" (licensed persons).

We submit that following the interdiction of Congress in 28 U.S.C. §1346(b) and 28 U.S.C. §2674 (Appendix D, *infra*, pp. 23, 24) the United States should be liable under the facts alleged by the petitioners.

On the particular facts, (that is, liability under state civil damage acts), the Sixth Circuit Court of Appeals has decided a Question that has not been decided by any other Court of Appeals or by this Court insofar as diligent research on behalf of petitioners has disclosed. We submit that in deciding this issue, which itself is novel, the Sixth Circuit Court of Appeals has departed from the principle that the United States of America shall be liable in tort claims for the wrongful act of its employee (air force base

bartender) in the same manner and to the same extent as a private citizen as set forth in statutes (28 U.S.C. §§1346(b) and 2674 (Appendix D, *infra*, pp. 23, 24)) and decisions of this Court. *Indian Towing Company v. United States*, 350 U.S. 61; 100 L. ed. 48, 76 S.Ct. 122; *United States v. Muniz*, 374 U.S. 150, 10 L. ed. 2d 805, 83 S. Ct. 850.

Petitioners also submit that the decision of the Sixth Circuit Court of Appeals is also in conflict in principle with the following decisions of other Courts of Appeals which hold that standards of conduct set up by state legislatures for application to private citizens shall be applied to Acts of employees of the United States of America though the acts were done in military or other United States reservations not subject to State Legislative or Criminal Jurisdiction.

Stewart v. United States, 186 F. 2d 627, (1951 7th Cir.) where state regulations on storage of explosives were applied in determining civil liability though the alleged wrongful acts were done on a military reservation. *American Exchange Bank v. United States*, 257 F. 2d 938 (1958, 7th Cir.). *Schmidt v. United States*, 273 F. 2d 172 (1959, 7th Cir.) where the Illinois scaffolding act was applied to injuries occurring on federal property.

CONCLUSION

This petition presents an important question under the Federal Tort Claims Act which has been decided contrary to the principle of treating the United States of America as a private citizen in tort claims and in conflict with principles laid down in decisions of other Courts of Appeals and by this Court.

For the reasons set forth above, this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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Washington, D. C. 20016

Dated: Washington, D. C.

....., 1965.

APPENDIX A

ORDER OF DISMISSAL

At a session of said Court, held in the Federal Building, Detroit, Michigan, on December 11, 1963.

Present: Honorable Talbot Smith, United States District Judge.

This matter having come on for hearing on October 21, 1963, upon defendant's Motion to Dismiss, and the Court having heard arguments of counsel for the respective parties, and after due consideration of all the arguments and the pleadings on file, and being duly advised in the premises, and the Court having rendered an opinion on said motion;

Now, Therefore,

It is ordered that the above-entitled cause be dismissed with prejudice.

/s/ Talbot Smith,
United States District Judge.

APPENDIX B

OPINION ON MOTION TO DISMISS

(Filed December 6, 1963)

The motion to dismiss must be granted.

Plaintiffs rely, primarily, as a basis for their asserted cause of action (brought under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*) upon the provision of the Michigan Liquor Control Act, found in M.S.A. §18.1000, that "No *vendor* shall sell any alcoholic liquor to any person in an intoxicated condition." (Emphasis supplied by the Court). It is alleged that the United States, through its employees, did so sell, at the Noncommissioned Officers' Club at Selfridge Air Force Base, to one Sergeant Russell Evans, who thereafter inflicted upon plaintiffs, through his negligent driving, serious injuries.

The Government has moved to dismiss, relying principally upon the proposition that the United States was not a "vendor," since a vendor is defined in the Act (M.S.A., §18.972(13) as "'a person licensed by the commissioner under this act to sell alcoholic liquor." No such licensing of the agents of the United States under the act has been established and, such being the case, it is argued, and the Court finds, that the act does not apply.

There is, moreover, no common law liability in this situation, absent statute. As to this aspect of the case it is the Court's judgment that the state of the law was accurately expressed in the case of *State v. Hatfield,* 197 Md. 249, 254-255, 78 A.2d 754, 756 in the following words: "No case, English or American, has been cited, and we have found none, in which (apart from statute) a seller of intoxicating liquor has been held liable for a tort of the buyer who drank the liquor." The chief obstacle to such recovery is, obviously, that of proximate cause.

Plaintiffs cite to us the case of Fournier v. United States, (S. D. Miss. 1963), 220 F.Supp. 752. In *Fournier,* plaintiff sued under the Federal Tort Claims Act for the accidental death of his wife. She was served drinks beyond her capacities in an officer's mess, fell down the stairs, and was fatally injured. The Court ruled that the proximate cause of her death was the combination of negligently served drinks, plus negligent upkeep of the stairs, assessed her contributory negligence at 50%, and awarded damages for the balance. We do not regard the case as applicable to the facts before the Court. The issue presented here is the applicability of the Michigan Liquor Control Act (the Dram Shop Act) to a situation wherein third parties suffer injury because of the tortious acts of the person served intoxicating liquor by a vendor of such liquor. The facts are neither parallel nor analogous to those presented in the Mississippi case. Mississippi, in fact, is a "dry" state.

An appropriate order may be presented.

/s/ Talbot Smith,
United States District Judge.

Detroit, Michigan,
December 6, 1963.

APPENDIX C

JUDGMENT AND OPINION OF THE CIRCUIT COURT OF APPEALS

No. 15856

UNITED STATES COUT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY L. MEGGE, ET AL.,
Plaintiffs-Appellants,
v.
THE UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided April 14, 1965

(Filed April 14, 1965)

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

PHILLIPS, Circuit Judge. This suit was brought under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671-2680. The question presented is whether a right of action lies under this statute for personal injuries and death resulting from an automobile accident allegedly caused by the negligence of an intoxicated Air Force sergeant who, while already intoxicated, was sold liquor at the bar of a noncommissioned officers' club at the Selfridge Air Force Base in Michigan.

Plaintiffs contend that the United States is liable under the Federal Tort Claims Act because of the provisions of the Michigan dramshop act, which creates a cause of action in favor of a person injured by reason of the unlawful sale of intoxicants to an already intoxicated person. M.S.A. §§18.993, 18.1000. The district court sustained the Government's motion to dismiss, and plaintiffs have appealed.

Under the averments of the complaint, a noncommissioned officers club was operated on the premises of the Air Force Base for the use and entertainment of Air Force personnel and their families and friends, where beer and other intoxicating liquors were sold. It is charged that on July 6, 1961, beer and other intoxicating liquors were sold "negligently, wrongfully and unlawfully" to the sergeant in question, in large quantities, and that such sales were continued after he had become intoxicated. Thereafter, while still in an intoxicated condition, the sergeant drove his 1960 Ford automobile off the Air Force Base onto the public highways of Michigan, crossed the center line of the highway and collided head on with the 1959 Volkswagen in which appellants were riding, proximately causing severe injuries and damages and the death of a minor child. It is not contended that the sergeant was acting in line of duty at the time of the accident.

Under 28 U.S.C. §1346(b), the jurisdiction of district courts under the Federal Tort Claims Act is limited to "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Under 28 U.S.C. §2671, "employee of the government" is defined to include members of the military or naval forces of the United States, and with respect to them the term "acting within the scope of his office or employment" is defined to mean "acting in line of duty."

There was no cause of action at common law against a person selling or dispensing liquor in favor of those injured because of the intoxication of the person drinking the liquor. It was not a tort at common law to sell or give liquor to an "able-bodied man." *State v. Hatfield,* 197 Md. 249, 254-255, 78 A.2d 754, 756; *Demge v. Feierstein,* 222 Wis. 199, 268 N.W. 210; *Cruse v. Aden,* 127 Ill. 231, 20 N.E. 73; 30 Am. Jur., Intoxicating Liquors, §520, p. 821; 48 C.J.S., Intoxicating Liquors, §430, pp. 716, 717, Annot. 130 A.L.R. 352, 357, 75 A.L.R.2d 833, 839. In *State v. Hatfield, supra,* the Supreme Court of Maryland said:

> "[T]he common law knows no right of action against a seller of intoxicating liquors, as such, for 'causing' intoxication of the person whose negligent or wilful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor. * * * No case, English or American, has been cited, and we have found none, in which (apart from statute) a seller of intoxicating liquor has been held liable for a tort of the buyer who drank the liquor." 78 A.2d at 756.

Appellants' cause of action is based upon the Michigan dramshop act which creates a liability unknown to the common law by providing:

> "Gifts; sales to intoxicated person. Sec. 29. No vendor shall give away any alcoholic liquor of any kind or description at any time in connection with his business except manufacturers for consumption on the premises only. *No vendor shall sell any alcoholic liquor to any person in an intoxicated condition.* (C.L. '48, §436.29) (Emphasis added.) M.S.A. §18.1000.

The district judge, the Honorable Talbot Smith, who formerly was an Associate Justice of the Supreme Court of Michigan, construed the Michigan dramshop act as inapplicable, saying:

"The Government has moved to dismiss, relying principally upon the proposition that the United States was not a 'vendor,' since a vendor is defined in the Act (M.S.A., §18.972(13)) as 'a person licensed by the commissioner under this act to sell alcoholic liquor.' No such licensing of the agents of the United States under the act has been established and, such being the case, it is argued, and the Court finds, that the act does not apply."

The dramshop act, which is a part of the Michigan liquor control act, requires that as a condition precedent to the approval and granting of any license for the retail sale of intoxicating liquors, the retailer shall post bond conditioned that any such retailer "will not directly or indirectly, by himself, his clerk or agent or servant at any time sell, furnish, give or deliver any alcoholic liquor to a minor except as provided in this act, nor to any adult person whatever who is at the time intoxicated, and that he will pay all damages actual and exemplary that may be adjudged to any person or persons * * * for injuries inflicted upon him or them either in person or property or means of support or otherwise, by reason of his selling, furnishing, giving or delivering any such alcoholic liquor." M.S.A. §993.

The statute proceeds to provide as follows:

"Every wife, husband, child, parent, guardian or other person who shall be injured in person or property, means of support or otherwise, by an intoxicated person by reason of the unlawful selling, giving or furnishing to any such persons any intoxicating liquor, shall have a right of action in his or her name against the person who shall by such selling or giving of any such liquor have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injury, and the principal and sureties to any bond given under this law shall be

liable, severally and jointly, with the person or persons selling, giving or furnishing any spirituous, intoxicating or malt liquors as aforesaid, and in any action provided for in this section, the plaintiff shall have the right to recover actual and exemplary damages in such sum not less than $50.00 in each case as the court or jury may determine: * * * (C.L. '48; §436.22.)" M.S.A. §18.993.

The noncommissioned officers club located on an Air Force Base in Michigan was not required to obtain a license or post bond or otherwise comply with the licensing law of the State of Michigan. The United States was not a "vendor" within the definition set forth in the Michigan liquor control act and could not be construed to come within the scope of that statute unless Congress has consented to do so by the enactment of the Federal Tort Claims Act. *Dalehite v. United States*, 346 U.S. 15, 30. The sale of liquor at the club on the Air Force Base cannot be said to be an unlawful sale.

We hold that the district court has adopted a permissible interpretation of the Michigan statute in ruling that the sales of intoxicants under the facts and circumstances of this case do not come within the scope of the Michigan liquor control act.

Having made this determination, it is not necessary for this court to pass upon the other issue presented by the Government's brief, i.e., that the Michigan statute imposes absolute liability without proof of negligence and therefore is beyond the scope of the consent to be sued which Congress legislated in enacting the Federal Tort Claims Act.

Affirmed.

APPENDIX D

STATUTORY PROVISIONS

28 U.S.C. §1254 provides:

> §*1254. Courts of appeals; certiorari; appeal; certified questions*
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1346 (b) provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2671 provides:

> §*2671. Definitions*
>
> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, §124, 63 Stat. 106.

28 U.S.C. §2674 provides:

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 U.S.C. §2680 provides:

§2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer or customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. As amended Sept. 26, 1950, c. 1049, §§2(a), (2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86-168, Title II, §202(b), 73 Stat. 389.

Mich. Comp. Laws 1948, §436.1; Mich. Stat. Ann. §18.971 provides:

SECTION 1. On and after the effective date of this act, it shall be lawful to manufacture for sale, sell, offer for sale, keep for sale, possess and/or transport any alcoholic liquor, as hereinafter defined, including alcoholic liquor used for medicinal mechanical, chemical or scientific purposes and wine for sacramental purposes, subject to the terms, conditions, limitations and restrictions contained herein, and only as provided for in this act.

Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession transportation and sale thereof.

No rule, regulation and/or order made by the commission shall unreasonably discriminate against Michigan manufacturers of alcoholic liquor.

The sheriffs of the several counties and their deputies and the village marshals, constables, officers or members of the village or city police and members of the department of state police, and inspectors of the commission, are hereby empowered and it is hereby made their duty to see that the provisions of this act and the rules and regulations made or authorized by said commission are enforced within their respective jurisdictions. It shall be their special duty to use their utmost efforts to repress and prevent crime and the violation of any of the provisions of this act. Any officer within the above enumeration who shall wilfully neglect or refuse to perform the duties imposed upon him by this section shall be guilty of a misdemeanor and upon conviction shall be fined not to exceed five hundred [500] dollars or imprisoned in the county jail not more than ninety [90] days, or both.

Mich. Comp. Laws 1948, §436.2; Mich. Stat. Ann. §18.972 provides:

SEC. 2. The words and phrases used in this act shall be construed [as defined in this section and in sections 2a to 2w, inclusive], unless the context shall otherwise require:

"Alcoholic liquor" shall include any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing ½ of 1 per cent or more of alcohol by volume which are fit for use for beverage purposes. The commission shall define and classify alcoholic liquor according to their alcoholic content as belonging to 1 of the varieties hereinafter defined.

"Beer" [shall] mean any beverage obtained by alcoholic fermentation of an infusion or decoction of barley, malt, hops and/or other cereal in potable water.

"Wine" [shall] mean the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, or any other fruit with the usual cellar treatment, and containing not more than 16 per cent of alcohol by volume. The term "wine" shall include fermented fruit juices other than grapes.

"Spirits" [shall] mean any beverage which contains alcohol obtained by distillation, mixed with potable water and other substances in solution and includes, among other things, wine containing an alcoholic content of over 16 per cent by volume.

"Alcohol" [shall] mean the product of distillation of fermented liquid, whether rectified or diluted with water or not, whatever may be the origin thereof. It does not mean ethyl and/or industrial alcohol, diluted or not, that has been denatured or otherwise rendered unfit for beverage purposes.

Mich. Comp. Laws 1948, §436.2 (M), Mich. Stat. Ann. §18.972(13) provides:

Retailer.] SEC. 2m. "Retailer" shall mean any person who customarily sells in small quantities to the consumer, except a retailer may be permitted to sell alcoholic beverages to the consumer in a single transaction in excess of 5 wine gallons, under such rules and regulations as the commission may establish.

Vendor.] "Vendor" shall mean a person licensed by the commissioner under this act to sell alcoholic liquor.

Wholesaler.] "Wholesaler" shall mean any person who shall sell only to retailers or jobbers or who shall sell to any person in quantities of not less

than 6 cases of beer at any time rather than to the consumer except to their employees.

Mich. Comp. Laws 1948, §436.22, Mich. Stat. Ann. §18.993 provides:

> SEC. 22. As a condition precedent to the approval and granting of any license, the following persons shall make, execute and deliver to the commission a bond or bonds, said bond or bonds to be executed by any surety company or companies authorized to do business in the state of Michigan or in the discretion of the commission by approved personal surety running to the people of the state of Michigan, in the following amounts:
>
> 1. Manufacturers, a bond or bonds in the sum of $5,000.00; wholesalers, a bond or bonds in the sum of $2,500.00; warehousemen, a bond or bonds in the sum of $2,500.00; specially designated distributors and specially designated merchants, a bond or bonds in the sum of $1,000.00, for the faithful performance of the conditions of the license issued and compliance with the provisions of this act; any manufacturer who has given the bond or bonds herein provided for shall not be required to give any additional bond or bonds for any warehouse he may own or operate.
>
> 2. Retailers of beer or wine for consumption on the premises, a bond or bonds in the sum of not less than $3,000.00 nor more than $5,000.00 in the discretion of the commission; retailers of spirits for consumption on the premises, a bond or bonds in the sum of not less than $5,000.00 nor more than $10,000.00, in the discretion of the commission, conditioned that any such retailer or specially designated merchant will not directly or indirectly, by himself, his clerk or agent or servant at any time sell, furnish, give or deliver any alcoholic liquor to a minor except as provided in this act, nor to any

adult person whatever who is at the time intoxicated, and that he will pay all damages actual and exemplary that may be adjudged to any person or persons, including those hereinafter mentioned, for injuries inflicted upon him or them either in person or property or means of support or otherwise, by reason of his selling, furnishing, giving or delivering any such alcoholic liquor.

The bond required by this act shall be substantially in the following form:

"Know all men by these presents, that we ..... as principal and ..... as surety are held and firmly bound unto the people of the state of Michigan in the sum of ..... dollars to the payment thereof well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals this ..... day of ..... A. D. 19....

Whereas, the above named principal purposes to carry on the business of ..... a ..... in the county of ....., state of Michigan.

Whereas, the said principal has covenanted and agreed and doth hereby covenant and agree as follows, to wit: That he will not directly or indirectly, by himself, his clerk, agent or servant at any time sell, furnish, give or deliver any spirituous, malt, brewed, fermented or vinous liquor, any mixed liquor or any mixture or compound a part of which is spirituous, malt, brewed, fermented or vinous liquor to a minor, nor to any adult person whatever who is at the time intoxicated, and that he will pay all damages actual and exemplary that may be adjudged to any person or persons for injuries inflicted upon him or them either in person or property or means of support or otherwise by reason of his selling, furnishing, giving or delivering any such

liquors. Now, the condition of this obligation is such that if the said principal shall well and truly keep and perform all and singular the foregoing covenants and agreements and shall pay any judgment for actual or exemplary damages which may be recovered against him in any court of competent jurisdiction and all fines and costs that may be imposed upon him for violations of this act, then this obligation shall be void and of no effect; otherwise, the same shall be in full force and effect.

Signed and sealed in
the presence of

.....L. S.

.....L. S."

The liquor control commission shall be empowered to embody such other provisions in the bond as it shall deem necessary.

Every wife, husband, child, parent, guardian or other persons who shall be injured in person or property, means of support or otherwise, by an intoxicated person by reason of the unlawful selling, giving or furnishing to any such persons any intoxicating liquor, shall have a right of action in his or her name against the person who shall by such selling or giving of any such liquor have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injury, and the principal and sureties to any bond given under this law shall be liable, severally and jointly, with the person or persons selling, giving, or furnishing any spirituous, intoxicating or malt liquors as aforesaid, and in any action provided for in this section, the plaintiff shall have the right to recover actual and exemplary damages in such sum not less than $50.00 in each

case as the court or jury may determine, but no surety shall be liable in excess of the amount of the bond required by this act. Any action shall be instituted within 2 years after the happening of the event. In case of the death of either party, the action or right of action given in this section shall survive to or against his or her executor or administrator, and in every such action by a husband, wife, child or parent, the general reputation of the relation of husband and wife or parent and child shall be prima facie evidence of such relation, and the amount so recovered by either husband or wife or parent and child shall be his or her sole and separate property. Such damages together with the costs of suit shall be recovered in an action of trespass on the case before any court of competent jurisdiction; and in any case where the parent shall be entitled to any such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other. The bond required by this act shall continue from year to year unless sooner cancelled by the surety. No surety shall cancel any bond except upon 10 days' written notice to the commission.

Mich. Comp. Laws 1948, §436.26(c); Mich. Stat. Ann. §18.997(3) provides:

SEC. 26c. No person shall maintain, operate, lease or otherwise furnish to other persons any premises or place which is not licensed under this act, wherein such other persons may engage in the drinking of alcoholic beverages, for a fee or for any other consideration, including the sale of food, mixers, ice or other fluids used with alcoholic drinks or the storage of alcoholic liquors: Provided, That the provisions of this section shall not apply to any hotel nor to any licensee under the provisions of this act: Provided further, That the provisions of this section shall not be construed to repeal or amend the provisions of section 26b of this act.

Mich. Comp. Laws 1948, §436.29; Mich. Stat. Ann. §18.1000 provides:

> SEC. 29. No vendor shall give away any alcoholic liquor of any kind or description at any time in connection with his business except manufacturers for consumption on the premises only. No vendor shall sell any alcoholic liquor to any person in an intoxicated condition.

Mich. Comp. Laws 1948, §436.44; Mich. Stat. Ann. §18.1015 provides:

> SEC. 44. Any person engaged in the business of selling or keeping for sale alcoholic liquor in violation of the provisions of this act, whether as owner, clerk, agent, servant or employe, shall be equally liable, as principal, both civilly and criminally, for the violation of the provisions of this act, or any person or principal shall be liable, both civilly and criminally, for the acts of his clerk, servant, agent or employe, for the violation of the provisions of this act.

Mich. Comp. Laws 1948, §436.54; Mich Stat. Ann. §18.1025 provides:

> Sec. 18.1025. *Liberal construction of act.*] SEC. 54. This act shall be liberally construed to effect the intent and purposes herein set forth. (C. L. '48, §436.54.)

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 294

MARY L. MEGGE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was instituted by petitioners under the Federal Tort Claims Act to recover for personal injuries and for the death of a minor child sustained in an automobile collision on a Michigan highway. Petitioners alleged that the collision was the fault of an Air Force Sergeant stationed at Selfridge Air Force Base in Michigan, who was driving his privately owned automobile after leaving the base in an intoxicated condition.

There was no allegation that the sergeant was acting in the line of duty at the time of the accident, but petitioners contended that the United States was liable because liquor had been served to the sergeant at a non-commissioned officers club on the base that evening. Petitioners relied upon the provisions of the Michigan Dram Shop Act (Pet. 29-32, 33), which hold any person guilty of the "unlawful" sale of liquor liable to anyone injured as a result of such sale and which make "unlawful" the sale of liquor by any "vendor" to any person in an intoxicated condition. Mich. Stat. Ann. §§ 18.993, 18.1000. The district court granted the government's motion to dismiss (Pet. 15) on the ground that "vendor" as used in the latter provision is defined by the statute to include only licensees under the Michigan Liquor Control Act (Pet. 28; Mich. Stat. Ann. § 18.972(13)). Since the United States is not required to have a State license, its sale of liquor was held not to be covered by that provision (Pet. 16). The court of appeals affirmed (Pet. 18-22; 344 F. 2d 31), with the observation that (Pet. 22)

> the district court has adopted a permissible interpretation of the Michigan statute in ruling that the sales of intoxicants under the facts and circumstances of this case do not come within the scope of the Michigan liquor control act.

This case obviously presents no issue warranting review by this Court since it turns entirely upon an interpretation of Michigan law. The courts below analyzed the Michigan statute and concluded that, in

prohibiting the sale of intoxicating liquor to an intoxicated person and creating a cause of action against the seller for injuries sustained by a third person by reason of such unlawful sale, the statute was limited to sellers otherwise regulated by the State's liquor laws. Petitioners cite no decision of the State court supporting a contrary result.

As the court below held, those injured by an intoxicated person had no claim at common law against a person who served liquor to the tortfeasor (Pet. 20). The Michigan courts have recognized that there is no such common-law right. *Jones* v. *Bourrie*, 369 Mich. 473, 476-477, 120 N.W. 2d 236, 238. Hence a private party would not be liable in the absence of statute; since the statute is inapplicable to the United States, there is no basis under State law for imposing liability upon the government.

Moreover, the Tort Claims Act authorizes the imposition of liability upon the United States only for negligent or wrongful acts, and does not permit recovery on a theory of absolute liability. *Dalehite* v. *United States*, 346 U.S. 15, 44-45. Consequently, even if the Michigan statute were applicable as a matter of State law, it could not constitute a basis for holding the government liable in this case. Michigan courts have construed the statute as imposing absolute liability irrespective of fault. *Wyatt* v. *Chosay*, 330 Mich. 661, 669, 48 N.W. 2d 195, 199-200; *Long* v. *Dudewicz*, 355 Mich. 469, 477, 94 N.W. 2d 844, 848.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JULY 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 V62155 52